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JUDGE TENA CAMPBELL

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BY: CENTRAL DIVISION
DEPUTY CLERK

JOHN MICHAEL WARNICK,

Plaintiff,

v.

O. LANE McCOTTER, FRED VANDER
VEUR, EARLE HOBBY, LORI
WORTHINGTON, FRANK MYLAR, and
KAYE HAYMOND,

Defendants.

Case No. 2:03-CV-170 TC

MEMORANDUM & ORDER

District Judge Tena Campbell

Plaintiff filed suit under 42 U.S.C. § 1983 alleging that the defendants violated his civil rights in connection with an employment disciplinary action. The case is presently before the court on Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) on the ground that Plaintiff's claim is time-barred.¹ (Dkt. nos. 4 & 10.)

I. BACKGROUND²

Plaintiff was employed as a correctional officer by the Utah Department of Corrections (UDOC). During his employment, he was subjected to a disciplinary action following the escape of an inmate from the Central Utah Correctional Facility on November 6, 1996. All of the

¹Defendant Worthington had not been served at the time the other defendants filed their motion do dismiss (dkt. no. 4). After service, she joined in the prior motion to dismiss (dkt. no. 10).

²The facts are derived from Plaintiff's complaint.

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defendants were UDOC employees who were involved in the disciplinary action taken against Plaintiff. The disciplinary action was begun on December 14, 1996, and the “final order ending disciplinary action” was issued April 28, 1997.³ Plaintiff alleges that Defendants violated his constitutional rights in the course of carrying out the disciplinary action.

II. STANDARD OF REVIEW

Defendants have filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. A complaint should be dismissed under Rule 12(b)(6) only if it appears that the plaintiff can prove no set of facts which would entitle him relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Ruiz v. McDonnell, 299 F.3d 1173, 1181 (10th Cir. 2002). For purposes of the motion to dismiss, the allegations in the complaint are taken as true and viewed in the light most favorable to the Plaintiff. Ruiz, 299 F.3d at 1181; Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir.1999); GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir.1997). Further, in considering the complaint, the court bears in mind that pro se pleadings should be liberally construed. Cummings v. Evans, 161 F.3d 610, 613 (10th Cir. 1998); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir.1991).

³Although it is not clear from the complaint, Plaintiff apparently resigned his position after receiving an administrative complaint stating the “intent of the UDC to terminate him.” (See Compl., counts 2 & 7, App. A, para. 10.) According to Defendants, Plaintiff’s last day of work was April 25, 1997.

III. DISCUSSION

Defendants contend that Plaintiff's claims are barred by the applicable statute of limitations. Section 1983 does not contain a statute of limitations. However, the Supreme Court has directed that in the absence of an explicit statute of limitations, the district court should adopt an analogous state limitation period so long as it is not inconsistent with federal law or policy. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The Court concluded that the most appropriate statute of limitations for section 1983 claims is the one applied to tort actions for personal injuries. Id. at 276. Where a state has more than one statute of limitations for personal injury cases, a federal court considering a section 1983 claim should apply the "general or residual statute for personal injury actions." Owens v. Okure, 488 U.S. 235, 249-50 (1989).

The Tenth Circuit has held that the appropriate limitations period for section 1983 claims in Utah is four years as set forth in Utah Code Ann. 78-12-25(3). Arnold v. Duchesne County, 26 F.3d 982 (10th Cir. 1994). In Arnold, the Tenth Circuit determined that Utah Code Ann. § 78-12-28(3) which contained a two-year limitation period applicable only to section 1983 cases was inconsistent with the purpose and nature of section 1983. Arnold, 26 F.3d at 986. The court noted that the statute discriminated against section 1983 claims by imposing a two-year limitation only on that class of cases, while other personal injury claims enjoyed a four-year limitation period. Id. at 987-88. The court therefore determined that the four-year period contained in § 78-12-25(3) was the appropriate limitation period for section 1983 cases. See also

Sheets v. Salt Lake County, 45 F.3d 1383, 1387 (10th Cir. 1995)(applying the four-year period, and noting that in enacting § 78-12-28(3), the Utah Legislature exceeded its authority so that the section is invalid).

In response to Arnold, the Utah legislature amended § 78-12-28(3) in an attempt to make it conform to the Arnold decision. The amended statute still imposed a two-year limitation period on federal civil rights cases without explicitly singling out section 1983. This court has since considered the amended statute on two occasions, finding that it is inconsistent with federal law, and that the four-year limitation period in § 78-12-25(3) should be applied to section 1983 claims. Larson v. Snow College, 189 F. Supp. 2d 1286, 1292-98 (D. Utah 2000); Whitehat v. College of E. Utah, 111 F. Supp. 2d 1161 (D. Utah 2000). Therefore, the four-year statute applies to the instant case.

Plaintiff alleges that the final decision in his disciplinary action was issued April 28, 1997. Applying the four-year limitation period, the time for filing the complaint would have run on approximately April 28, 2001. Plaintiff filed his complaint February 13, 2003, well outside the limitation period.

Plaintiff makes several arguments as to why his case should not be dismissed. First, he contends that Defendants improperly filed their motion to dismiss before he had completed service on all of the defendants. He claims that the motion to dismiss is therefore premature. However, Plaintiff misunderstands the process as set out in the Federal Rules of Civil Procedure.

Once any defendant is served, that defendant is required to file an answer or other responsive pleading within twenty days. See Fed. R. Civ. P. 12. Under Plaintiff's reasoning, a party could delay a case indefinitely by failing to serve at least one of the defendants. Moreover, even if counsel had waited to file the motion until all the defendants had been served, it would not change the fact that the statute of limitations had run before Plaintiff filed his complaint.

Plaintiff has filed a document entitled "Plaintiff's Motion that the Statute of Limitations Be Waived." (Dkt. no. 13.) In support of this motion, he argues that the limitations defense should be waived because Defendants failed to raise it by answer. In Plaintiff's view, Defendants are required to file an answer before they may file a motion to dismiss. However, Rule 12(b) contemplates that certain defenses may be made by motion prior to answering the complaint, including a motion to dismiss for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

In Miller v. Shell Oil Co., 345 F.2d 891, 893 (10th Cir. 1965), the Tenth Circuit held that an affirmative defense may be raised in a 12(b) motion "[i]f the defense appears plainly on the face of the complaint itself." Subsequently, the court made clear that a statute of limitations defense may be appropriately resolved on a 12(b)(6) motion "when the dates given in the complaint make clear that the right sued upon has been extinguished." Aldrich v. McCulloch Props., Inc., 627 F.2d 1036, 1041 n.4 (10th Cir. 1980). In the instant case, it is clear from the face of the complaint that the events upon which Plaintiff's claims are based were complete no later

than April 28, 1997. Since Plaintiff did not file this case until February 13, 2003, it is barred by the statute of limitations.

Plaintiff also appears to argue that his claims did not accrue until he discovered certain facts, or that the statute should be tolled. (See dkt. nos. 9 & 12.)⁴ The Tenth Circuit has noted that although state law governs limitations and tolling issues, accrual of a section 1983 claim is governed by federal law. Fratus v. DeLand, 49 F.3d 673, 675 (10th Cir. 1995); Baker v. Board of Regents, 991 F.2d 628, 632 (10th Cir. 1993). A section 1983 claim accrues when the plaintiff knows or has reason to know of the violation of his constitutional rights. Beck v. City of Muskogee Police Dep't, 195 F.3d 553, 557 (10th Cir. 1999); Smith v. City of Enid, 149 F.3d 1151, 1154 (10th Cir. 1998). In an analogous situation, the Tenth Circuit has held that a claim alleging denial of a fair trial accrues at the time the trial concludes. Johnson v. Johnson County Comm'n Bd., 925 F.2d 1299, 1301 (10th Cir. 1991). Here, Plaintiff's claims are based on the alleged unfairness of the disciplinary process. Thus, he was aware of the facts giving rise to his claims on April 28, 1997 when he received the final order with respect to the disciplinary action.

Plaintiff appears to argue that the statute did not start to run until June 1999 when he discovered critical information allegedly withheld by the defendants. (Dkt. no. 9, para. 5.) After Defendants noted that Plaintiff failed to identify the so-called "critical information," Plaintiff

⁴Plaintiff has filed numerous documents in opposition to the motion to dismiss, contrary to the local rules which allow a party to file only one opposition. (DUCivR 7-1(b)(3). Plaintiff has not sought permission of the court to file these extraneous documents. Nevertheless, in light of his pro se status, the court has considered all of Plaintiff's documents.

filed a document in which he attempts to describe this information. (Dkt. no. 12.) The information described by Plaintiff appears to be in the nature of evidence that would support his claims. However, it is not necessary that a plaintiff know all of the evidence that might support his claim in order for the claim to accrue. Baker, 991 F.2d at 632; Blumberg v. HCA Management Co., 848 F.2d 642, 645 (5th Cir. 1988). Further, as Defendants point out, Plaintiff's complaint and other filings are replete with dates of the alleged civil rights violations, demonstrating that Plaintiff was in possession of the facts necessary to file his complaint within the limitations period.

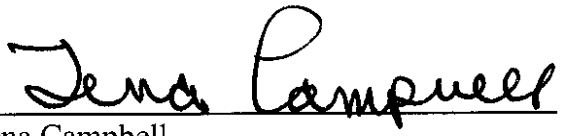
Finally, Plaintiff contends that the statute should be tolled because his "cause of action has been fraudulently concealed." (Dkt. no. 12.) There is no support whatsoever for this allegation. Plaintiff asserts that the defendants failed to inform him of various changes in UDOC policies and procedures and of his right to appeal. However, even if true, this would not have prevented Plaintiff from discovering the claims arising from the disciplinary action. See Ledoux v. Davies 961 F.2d 1536, 1537 (10th Cir. 1992)(observing that the plaintiff had offered no rational argument as to the nature of the fraud or how it kept him from discovering the alleged constitutional violations). Plaintiff knew, or should have known, the basis for his claims no later than April 1997. Thus, his complaint, filed on February 13, 2003, was not timely filed.

ORDER

Plaintiff's claims are barred by the four-year statute of limitations. Therefore, Defendants' motion to dismiss is GRANTED and the case is DISMISSED. (Dkt. nos. 4 & 10). Plaintiff's motion to waive the statute of limitations is DENIED. (Dkt. no. 13.)

DATED this 23 day of December, 2003.

BY THE COURT:



Tena Campbell
United States District Judge

alt

United States District Court
for the
District of Utah
December 30, 2003

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00170

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Bless S. Young, Esq.
UTAH ATTORNEY GENERAL'S OFFICE
LITIGATION UNIT
160 E 300 S 6TH FL
PO BOX 140856
SALT LAKE CITY, UT 84114-0856
EMAIL

John Michael Warnick
PO BOX 216
EPHRAIM, UT 84627